S.B.Civil Writ Petition No.296/2006

Mahesh Parihar & Ors.
Vs

Raja Ram & Ors.

Date of order : 25.10.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.MR Singhvi, for the petitioner.
Mr.T. Gupta, for the respondents.

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Learned counsel for the respondent submitted an application for early hearing of the writ petition.

However, at the request of learned counsel for the parties, the writ petition itself has been heard today itself.

The plaintiffs-petitioners field one civil original suit no.102/1995 for specific performance of contract dated 20.8.1976 on the ground that defendants agreed to sell property involved in the suit to the plaintiffs for a consideration of Rs.48,000/- and handed over possession of the suit property to the plaintiffs. The defendants did not execute the sale deed, therefore, plaintiffs filed the suit for specific performance of contract. The suit was decreed by the learned Addl. Civil Judge (Sr. Div.) No.2, Jodhpur vide judgment and decree dated 5.10.1999. No appeal against the said judgment

and decree dated 5.10.1999 was filed till 2001 and an execution petition no.4/2001 was submitted by the decree holders in the trial court. In the trial court the counsel for judgment-debtors appeared and even on 25th May, 2003 informed the court that judgment-debtors themselves will execute the sale deed in favour of the decree holders, but that was not done for a long period and execution proceedings continued and ultimately on 19.5.2005 the court directed to get the sale deed registered through court officer. The judgment-debtors even contested the execution and a detail order was passed by the executing court on 7.2.2005 for affecting the sale deed registered in favour of the decree holders. The said order of the executing court dated 7.2.2005 was challenged by preferring revision petition no.81/2005 before this Court, which was dismissed by this Court on 15.3.2005. It is said that the order dated 15.3.2005 of this Court passed in revision petition no.81/2005 was challenged before the Hon'ble Supreme Court and SLP was dismissed. Thereafter, in the year 2005, the same judgment-debtors preferred appeal to challenge the judgment and decree dated 5.10.1999 i.e., after delay of about six years. The petitioner has placed on record the copies of the order-sheets of the judgment-debtors' appeal no.80/2005. It appears from the first order-sheet that appeal was

registered subject to objection of limitation and the limitation has not been condoned by the court. In this appeal preferred by the judgment-debtors-defendants, the present applicants submitted an application under Order 1 Rule 10 CPC on 8.8.2005. In the application filed under Order 1 Rule 10 CPC, the applicants stated that they are also co-owners of the property in dispute. They further submitted that the defendant Rajaram did not execute the agreement to sell as power of attorney and in absence of the applicants, the title of the suit cannot be determined. It is also submitted that the applicants are in possession of the property in dispute and, therefore, they may be impleaded as appellant in the appeal preferred by the judgment-debtors-defendants. The said application was allowed by the learned Addl. District Judge No.2, Jodhpur vide order dated 3.1.2006.

According to learned counsel for the appellants-decree holders the judgment and decree dated 5.10.1999 was passed against the defendants of that suit no.102/1995 in the year 1999. The execution petition was submitted in the year 2001. In that execution petition, defendants appeared and contested the execution and, thereafter, a detail order was passed by the executing court on 7.2.2005 and court appointed the court officer to execute the sale deed

in favour of the petitioners. The order of the executing court dated 7.2.2005 was challenged by preferring revision petition which was dismissed and the SLP was also dismissed. Not only this, but defendants themselves after six years preferred regular appeal and, thereafter, the applicants came up with the case that they are co-owner of the property in dispute and their title cannot be determined without impleading them as appellant. According to learned counsel for the petitioners in a suit for specific performance of contract, the question of title cannot be determined. It is also submitted that decree has already been executed and in the revision petition when specific objection was raised by the judgment-debtors that the judgment-debtors are not competent to sell the property that was rejected by this Court by order dated 15.3.2005 passed in revision petition no.81/2005 after holding that decree is against the petitioners and they are bound to execute the document. It is also submitted that in the entire application filed under Order 1 Rule 10 CPC there is no reason mentioned for moving the application for becoming party at appellate stage when the suit was decreed against the defendants and one of the defendant-respondent Rajaram is also admittedly disciples of the same Guru who was the Guru of the applicants. Not only this, the

applicants themselves stated that they are co-sharers then they admit the title of the defendants-judgment-debtors. Apart from above, the applicants nowhere stated that Rajaram was not their power of attorney. Their entire case was that Rajaram did not execute the agreement to sell the property as power of attorney. There is distinction between not being a power of attorney and not executing an agreement to sell as power of attorney. Not only this, there is no allegation against Rajaram that his interest was conflicting with the interest of the applicants at any point of time then the applicants did not plead how they came to know about this litigation in the year 2005. Then there is no reason for permitting the applicants to be impleaded as party in first appeal.

Learned counsel for the respondents vehemently submitted that the respondents-applicants are the co-sharers in the property and, therefore, they were rightly impleaded as party in the appeal. It is also submitted that they already preferred one appeal no.99/1995 (against which decree, no particulars mentioned) which is pending in the appellate court and in that appeal, an interim order (against whom and what injunction not made clear) was passed on 8.2.1999. It is also submitted that since the applicants are owner of the property therefore, it

could not have been transferred by anybody else on behalf of the applicants and, therefore, to prove this fact, the applicants were necessary party. It is also submitted that this court may not interfere in the impugned order, which was passed under Order 1 Rule 10 CPC by the appellate court as there cannot be any prejudice to the petitioners if the order under challenge remained as it is.

I considered the submissions of learned counsel for the parties and perused the record and the facts of the case.

It is settled law that in a suit for specific performance of contract, even a person claiming himself to be the owner of the property cannot be impleaded as party as decree is passed only against the person who executed the agreement to sell and suit is decreed for specific performance of contract irrespective of the fact whether the alleged vendor has valid title to the property or not. This is because of the reason that suit for specific performance of contract is a suit of special nature and filed for specific performance of specific contract only. The court passes decree for performance of contract irrespective of fact whether the vendor has valid title to property or not? In this case, the suit was decreed against Rajaram, Smt. Daymanti Devi Shankhala and Narendra Singh and decree

passed in the suit was sought to be executed after about more than one year. The execution continue for a long period of about 4 years and the defendants-judgment-debtors appeared and contested the execution and, thereafter, the executing court passed a detailed order on 7.2.2005. The said order was challenged by preferring by the same defendants by preferring revision petition no.81/2001 and that was dismissed by this Court and SLP against the said order was dismissed. The applicants-respondents in their application did not disclose that how they had no knowledge of this litigation when one of the defendants was also disciple of the same Guru who is Guru of the applicants also and contested the matter upto Supreme Court. In the application there is no allegation against the defendant Rajaram that he suppressed the facts from the applicants. Rather say in the application itself it is very clearly stated by the applicants that Rajaram was plain and simple person. In the application it is nowhere stated that Rajaram was not their power of attorney, but only stand taken is that Rajaram did not execute the agreement to sell as power of attorney. Nothing has been stated that if they were aggrieved then why the applicants did not choose to challenge the judgment and decree by preferring appeal as aggrieved person against the judgment and decree passed in the

year 1999 and which was already executed in the year 2005 before preferring appeal by even Rajaram. The applicants did not disclose from whom they came to know about the fact of present first appeal if they had no knowledge from the defendant Rajaram who himself is the disciple of the same Guru to whom they belong. It is true that normally this court will not interfere in the order passed under Order 1 Rule 10 CPC as that may be treated to be an order passed by exercising discretionary power of the court and may be passed looking to the each facts of the case but when it is settled law that in a suit for specific performance of contract even true owner and person who is claiming himself to be the true owner cannot be impleaded as party then there was no reason to implead the applicants as party in appeal preferred by defendants.

It appears from the order of the court below that court below failed to notice this legal position and exceeded its jurisdiction by allowing the applicants to become party in the appeal and that too, for the purpose of establishing their title in appeal for which decree was granted by the trial court against the defendants and the court has already executed the sale deed. In addition to above, the party cannot become party in the litigation as a matter of right and, therefore, the

party is required to disclose his all bonafides. In this case, the applicants' only word of mouth is that they were residing at Gujarat and they had no knowledge of complete and true facts of this litigation and they got information just now (when application was filed). Virtually there is no explanation for not becoming party in the suit and not preferring appeal by applicant themselves.

In view of the above reasons, this court deems it proper to interfere in the order passed by the trial court dated 3.1.2006. Apart from above it will be worthwhile to mention here that in the order dated 3.1.2006, the appellate court even observed against the finding recorded by the trial court in the judgment and decree and which is under challenge in the appeal, therefore, virtually the observations are on merits of the appeal itself in an application moved by the stranger to the litigation.

In view of the above reasons, the writ petition of the petitioners is allowed, the order dated 3.1.2006 is set aside. No order as to costs.

(PRAKASH TATIA), J.

c.p.goyal/-